PP

v.

HO HUAH TEONG

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
ABDUL HAMID MOHAMAD JCA
ABDUL KADIR SULAIMAN JCA
[CRIMINAL APPEAL NO: P09-3-97]
3 AUGUST 2001
[2001] CLJ JT(5)

CRIMINAL PROCEDURE: *Transfer of cases - Power of Sessions Court - Whether may transfer case to Magistrate's Court without consent of Public Prosecutor - Discretion of Attorney-General as Public Prosecutor to institute proceedings - Whether unfettered - Whether s. 104 Subordinate Courts Act 1948 subject to art. 145(3) Federal Constitution and s. 376(1) Criminal Procedure Code*

CONSTITUTIONAL LAW: *Courts - Power to transfer cases - Power of Sessions Court - Whether may transfer case to Magistrate's Court without consent of Public Prosecutor - Discretion of Attorney-General as Public Prosecutor to institute proceedings - Whether unfettered - Whether s. 104 Subordinate Courts Act 1948 subject to art. 145(3) Federal Constitution and s. 376(1) Criminal Procedure Code*

The accused was charged in the Sessions Court under s. 408 of the Penal Code. However, before his trial could commence, the sessions judge, on his own motion, transferred the case to the Magistrate's Court. The Public Prosecutor's instant appeal to the Court of Appeal was against the refusal of the High Court to exercise its powers of revision in respect of the said transfer order of the sessions judge. Relying on s. 104 of the Subordinate Courts Act 1948, the High Court had held that the sessions judge had the power to order the said transfer. Thus, the sole question of law that arose for decision here was: where an offence for which a person has been charged falls within the jurisdiction of both the Magistrate's Court and the Sessions Court and the Public Prosecutor has instituted proceedings in the Sessions Court, does the Sessions Court have the power to transfer the case to the Magistrate's Court without the consent of the Public Prosecutor?

Held:
Per Abdul Hamid Mohamad JCA

[1] Where the Public Prosecutor has, in the exercise of his discretion, charged a person for a criminal offence in the Sessions Court, the Sessions Court does **not** have the power to transfer the case to the Magistrate's Court for trial without the consent of the Public Prosecutor. Section 104 of the Subordinate Courts Act 1948 must be read subject to art. 145(3) of the Federal Constitution and s. 376(1) of the Criminal Procedure Code. The words "institute, conduct or discontinue" in art. 145(3) of the Federal Constitution are wide enough to confer upon the Attorney-General (Public Prosecutor) an unfettered discretion to choose in which court he wishes to commence proceedings against an accused person.

[Public Prosecutor's appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Tertuduh telah dituduh dalam Mahkamah Sesyen di bawah s. 408 Kanun Keseksaan. Walaubagaimanapun, sebelum perbicraan beliau boleh bermula, hakim Mahkamah Sesyen atas usulnya sendiri, telah memindahkan kes tersebut kepada Mahkamah Majistret. Rayuan semasa Pendakwa Raya kepada Mahkamah Rayuan adalah terhadap penolakan Mahkamah Tinggi untuk melaksanakan kuasa-kuasa penyemakannya berhubung perintah pemindahan oleh hakim Mahkamah Sesyen. Bergantung pada s. 104 Akta Mahkamah Rendah 1948, Mahkamah Tinggi telah memutuskan bahawa hakim Mahkamah Sesyen mempunyai kuasa untuk memerintah pemindahan tersebut. Oleh itu, persoalan tunggal yang berbangkit untuk keputusan di sini adalah: di mana sesuatu kesalahan bagi yang mana seseorang telah dituduh terlingkung di dalam bidangkuasa Mahkamah Majistret dan juga Mahkamah Sesyen dan Pendakwa Raya telah memulakan prosiding dalam Mahkamah Sesyen, adalah Mahkamah Sesyen mempunyai kuasa untuk memindahkan kes tersebut kepada Mahkamah Majistret tanpa kebenaran Pendakwa Raya?

Diputuskan:
Oleh Abdul Hamid Mohamad HMR

[1] Di mana Pendakwa Raya telah, dalam melaksanakan budibicaranya, menuduh seseorang bagi kesalahan jenayah dalam Mahkamah Sesyen, Mahkamah Sesyen **tidak** mempunyai kuasa untuk memindahkan kes itu kepada Mahkamah Majistret untuk perbicaraan tanpa kebenaran Pendakwa Raya. Seksyen 104 Akta Mahkamah Rendah 1948 mesti

dibaca tertakluk kepada per. 145(3) Perlembagaan Persekutuan dan s. 376 Kanun Prosedur Jenayah. Perkataan-perkataan "institute, conduct or discontinue" ("memulakan, mengendalikan atau menghentikan") dalam per. 145(3) Perlembagaan Persekutuan adalah cukup luas untuk memberikan Peguam Negara (Pendakwa Raya) suatu budibicara yang tidak terbelenggu untuk memilih dalam mahkamah yang mana beliau ingin memulakan prosiding terhadap seseorang tertuduh.

[Rayuan Pendakwa Raya dibenarkan.]

Case(s) referred to:
Abdul Wahab v. PP [1970] 2 MLJ 203 ***(refd)***
Long Samad v. PP [1974] 2 MLJ 152 ***(foll)***
PP v. Johnson Tan Han Seng [1977] 2 MLJ 66 ***(foll)***
PP v. Lim Shui Wang & Ors [1979] 1 MLJ 65 ***(foll)***
PP v. Tengku Hitam [1962] 28 MLJ 68 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 376(1)
Federal Constitution, art. 145(3)
Penal Code, s. 408
Subordinate Courts Act 1948, s. 104

For the appellant - Vong Poh Fah SDPP
For the respondent - T Theebajothi; M/s Kumar & Co

Reported by Gan Peng Chiang

JUDGMENT

Abdul Hamid Mohamad JCA:

The respondent was charged in the Sessions Court on two counts, both under s. 408 of the Penal Code involving two sums of money ie, RM227,048.50 and RM309,364.50. The trial was scheduled to begin from 20 to 22 January 1997. But, on 30 December 1996 the Sessions Court judge, on his own motion, ordered that the case be transferred to the Magistrate's Court for trial.

The Deputy Public Prosecutor, being unhappy with the said order requested the High Court to exercise its power of revision over the said order of the Sessions Court. The High Court held that the Sessions Court had power to order the transfer and declined to exercise its revisionary power pursuant to Chapter XXXI of the Criminal Procedure Code. The Public Prosecutor appealed to this court.

The appeal came up for hearing on 15 January 2001 before Lamin Mohd Yunus, the then President of the Court of Appeal, Abdul Kadir Sulaiman JCA and myself. Considering that the point of law that the court was asked to decide for the first time is of considerable importance, we ordered both parties to put in written submissions and adjourned the appeal to another date to be fixed for decision. The Deputy Public Prosecutor gave us his written submission on 22 February 2001. But, the learned counsel for the respondent, by a letter dated 30 March 2001 informed the court that he agreed with the submission of the learned Deputy Public Prosecutor that the learned High Court judge had wrongly refused to exercise her revisionary power.

In the meantime the President of the Court of Appeal has retired, leaving my brother Abdul Kadir Sulaiman JCA and myself to give our judgment.

We were told by the learned Deputy Public Prosecutor that the trial in the Magistrate's Court had commenced as the Public Prosecutor did not want any further delay in the disposal of the case. In other words, the Public Prosecutor, for reasons of expediency, has consented to the trial to proceed in the Magistrate's Court. However, as this is a question of law of great importance to the Public Prosecutor and as such transfers of cases are often made by Sessions Court judges, on their own motion, the Deputy Public Prosecutor and the learned counsel for the respondent urged this court to make a ruling. It must therefore be understood that this ruling will not affect the trial in the Magistrate's Court, which has now received the consent of the Public Prosecutor.

The question can be thus put: Where an offence for which a person is charged falls within the jurisdiction of both the Magistrate's Court and the Sessions Court and the Public Prosecutor has instituted proceeding in the Sessions Court, has the Sessions Court, without the consent of the Public Prosecutor, the power to transfer the case to the Magistrate's Court?

The learned High Court judge held that the Sessions Court had such power, relying on s. 104 of the Subordinate Courts Act 1948, which provides:

> A Sessions Court Judge or a Magistrate shall have jurisdiction in any criminal cause or matter, whether or not he has jurisdiction finally to hear and determine the same, to order, in any case where the interests of justice so require, that the cause or matter be transferred to any other Sessions Court or Magistrate's Court, as the case may be, which in his opinion has jurisdiction to hear and determine the same, and the same may be continued in that other Court accordingly:

> Provided that nothing in this section shall be deemed to confer jurisdiction on any court to which a proceeding is so transferred, if that court would not otherwise have jurisdiction in respect thereof.

She further held that the Federal Court judgment in *Public Prosecutor v. Lim Shui Wang & Ors* [1979] 1 MLJ 65 was distinguishable.

Before us, the learned Deputy Public Prosecutor, argued that that provision of s. 104 of the Subordinate Courts Act 1948 was overidden by the provisions of art. 145(3) of the Federal Constitution and also s. 376(1) of the Criminal Procedure Code.

Article 145(3) of the Federal Constitution provides:

> The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

Section 376(1) of the Criminal Procedure Code provides:

> The Attorney-General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

There is no doubt that under art. 145(3) of the Federal Constitution, the Public Prosecutor may choose to charge a person for a more or less serious offence provided by law. *Long bin Samad v. Public Prosecutor* [1974] 2 MLJ 152 (FC) and *PP v. Johnson Tan Han Seng* [1977] 2 MLJ 66 (FC) are directly on point.

There is also no doubt that the Public Prosecutor may choose to charge and prosecute a person either in the High Court, the Sessions Court or the Magistrate's Court, provided the court has jurisdiction over the offence. This is made clear by Suffian LP in *Public Prosecutor v. Lim Shui Wang* [1979] 1 MLJ 65 (FC):

> We next turn to section 376(1) of the Criminal Procedure Code and article 145(3) of the Constitution.
>
> In our view the words "institute, conduct" in article 145(3) are wide enough to confer on the Attorney-General unfettered discretion to choose in which court, a higher or lower court, to bring persons charged under section 39B(1)(a) of the Dangerous Drugs Ordinance, though of course he does not have nor is it contended that he has, power to choose which particular judge or president should actually try the case. The word "institute" means to set on foot, initiate, start, so that the Attorney-General has power, at his discretion, to initiate a case such as the present one, before a Special

President or a High Court judge. We respectfully agree with Abdoolcader J when he said at page 119 in *Public Prosecutor v. Datuk Harun bin Haji Idris*[2]:

> 'Institute' in article 145(3) ... . Must necessarily refer to the commencement of proceedings and prosecutions ... . It may well be ... that the Public Prosecutor or Sessions Court to be tried in the High Court after a preliminary enquiry. This power to so direct would, if exercised, fall squarely within his discretion to institute and conduct criminal prosecutions and proceedings.

In view of the large quantity of heroin involved and the serious drug problem that afflicts the young in this country, it is obvious that the Attorney-General has information and sources of information not available to the courts, and possessed of this information he may regard it as his public duty to have these persons tried in a court which has power to pass sentence of death, though that still leaves the trial court free to impose a lesser penalty if it thinks fit, and if he does so, the High Court has no alternative but to try the case.

Indeed, there are occasions when the Public Prosecutor having charged a person in the Magistrate's Court, the High Court, on appeal commented that in view of the criminal record and history of the accused, the Public Prosecutor should have charged him in the Sessions Court, so that a heavier sentence may be imposed, if convicted. *Public Prosecutor v. Tengku Hitam* [1962] 28 MLJ 68 (Hashim J) and *Abdul Wahab v. Public Prosecutor* [1970] 2 MLJ 203 (Sharma J) are good examples.

But these are not the issues in the present case. The issue here is whether the Public Prosecutor having charged the respondent in the Sessions Court, the Sessions Court may transfer the case to the Magistrate's Court for trial.

Reading s. 104 of the Subordinate Courts Act 1948 by itself, there is no doubt that it is within the power of the Sessions Court judge to do so. But, can the Sessions Court do so in view of the provisions of art. 145(3) of the Federal Constitution and 376(1) of the Criminal Procedure Code?

We are of the view that the answer is in the negative. Our reasons are as follows: If we accept, as indeed we do, that the Public Prosecutor may choose in which court having jurisdiction over the offence a person may be charged and tried, then, to allow that court to transfer it to another court, is to negate that discretion and decision of the Public Prosecutor. Indeed, that would amount to an interference by the court in the exercise of discretion by the Public Prosecutor in the discharge of his public duty enshrined in the Constitution. Administratively, it may also lead to the

Sessions Court passing the bulk to the Magistrate's Court causing delay in the trial and disposal of the case as has happened in this case. We are also of the view that this conclusion is supported by the principles laid down in *Public Prosecutor v. Lim Shui Wang & Ors* [1979] 1 MLJ 65 (FC) and the observations made by the learned judges in *Public Prosecutor v. Tengku Hitam* [1962] 28 MLJ 68 and *Abdul Wahab v. Public Prosecutor* [1970] 2 MLJ 203.

We hold therefore that where the Public Prosecutor has in the exercise of his discretion, charged a person for a criminal offence in the Sessions Court, the Sessions Court, without the consent of the Public Prosecutor, has no power to transfer the case for trial in the Magistrate's Court, even though the Magistrate's Court has jurisdiction over the offence.

The appeal is allowed.